No. 187

In the Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
CLYDE O. MARTZ,
Assistant Attorney General,
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This supplemental brief is filed in response to the Court's order of January 29, 1968, restoring the case to the calendar for rebriefing and reargument (390 U.S. 916).

We reiterate, without further argument, the principal conclusions stated in our original brief, *viz.*:

(1) That the Treaty of Wolf River of 1854 may fairly be read as granting to the Menominee Tribe a special property interest in the wildlife of the reservation;

(2) That the Termination Act of 1954 did not deprive the tribe of any property right conferred by the treaty; and,

(3) That, accordingly, the United States, having neither taken property from the tribe nor abrogated any treaty guarantee, owes nothing to the Menominees.

Although these propositons, if correct, are fully sufficient to support the judgment below, we did attempt, in our earlier brief, to give a rough definition to the boundaries of the treaty right presently enjoyed by the Menominees. In light of the Court's questions at oral argument, we now elaborate somewhat on that point and also address ourselves for a moment to a question not previously briefed—who are the present and future beneficiaries of whatever treaty hunting and fishing rights survived termination.

A. THE SCOPE OF THE TRIBE'S TREATY IMMUNITY FROM STATE REGULATION OF HUNTING AND FISHING

We repeat our original premise: that whatever rights with respect to hunting and fishing were guaranteed[1] by the Treaty of 1854 survive unimpaired today. Accordingly, to determine the present scope of those rights we look to the situation prevailing prior

[1] We share the view of the Wisconsin Supreme Court in *State* v. *Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41, certiorari denied, 377 U.S. 991 (A. 54–56), and the Court of Claims in the decision under review (A. 9) that it is irrelevant whether the Treaty of 1854 is properly viewed as *conferring* these rights as an incident of a cession of lands to the Indians, or, rather, as *confirming* pre-existing rights which the Indians already enjoyed in lands which they already held and reserved to themselves when they ceded their other lands to the government. At all events, if the treaty is read as encompassing a right to hunt and fish on the reservation lands, there is a guarantee running from the United States to the tribe.

to the effective date of the Termination Act of 1954.

In other circumstances, it would be appropriate to focus directly on the rights guaranteed, measuring them by the language of the grant, the usages of the times, and other indications of the probable understanding of the parties. But that approach is largely foreclosed here. The text of the Treaty of 1854, which does not expressly mention hunting or fishing and confers those rights only by implication, is not illuminating. Nor would it be profitable to probe the intent of the contracting parties with respect to the limits of the rights granted, since the conditions which bring into issue the restrictions imposed by modern conservation laws were doubtless not contemplated in 1854.

That is not to say that the circumstances prevailing at the time of the treaty are wholly irrelevant. On the contrary, it is significant that the Menominees hunted and fished only for their own needs and were not engaged in commercial ventures. While that fact may not entirely preclude some limited sales in the changed conditions of today, it would seem to foreclose any commercial licensing of outsiders to hunt or fish on the reservation lands, and perhaps suggests a quantitative limitation on the Indians' right to take wildlife. Also relevant, we think, are the methods in use in 1854. We do not suggest that the Menominees are not entitled to take advantage of modern improvements in hunting and fishing equipment, but it is doubtful that they can properly invoke the protection of the treaty for wholly new devices whose capabilities for

capturing game is revolutionary by relation to the traditional gear they were using when the grant was made.

Perhaps the most important fact about the treaty guarantee, however, is that it does not include any express immunity from outside regulation of any reservation to the tribe itself of an exclusive right to regulate hunting or fishing. This, we believe, authorizes a definition of the rights conferred in terms of the power of the federal government to restrict their exercise for certain purposes before termination.

It may well be that the State, as the new sovereign exercising jurisdiction over the former reservation lands, does not enjoy the same relationship toward the Indians, and is not technically a successor of the prerogatives of the United States as their guardian before termination. But, in our view, that does not affect the question. The State is entitled, by the express provisions of the Termination Act, to apply its laws to the Menominee lands except only as the Treaty of 1854 grants exemption. And the scope of that exemption or immunity from regulation, it would seem, cannot be broader than it was at the beginning and throughout the century of federal supervision. Thus, to the extent that the United States, after conferring a privilege to hunt and fish, was barred—short of violating the treaty—from curtailing it, there was, and subsists, a true right in the tribe. But, insofar as the federal government could properly regulate the taking of wildlife on the reservation—whether that power was exercised or not—we submit the In-

dians enjoyed no immunity and can claim none now as against the State.

What, then, was the scope of the federal power to restrict hunting and fishing on the Menominee Reservation before termination? Unfortunately, authoritative precedents are lacking. But that is not really surprising. On the one hand, Congress has undoubted *constitutional* power to abrogate treaty rights, and, until recently, except as special jurisdictional acts waived sovereign immunity, the issue whether a compensable taking of property rights had occurred could not be litigated. See, *e.g., Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565–567. On the other hand, as a matter of history, the federal government rarely attempted to exercise any authority over hunting and fishing on Indian reservations, and the one litigated instance involved perhaps excessive administrative regulations promulgated without express congressional sanction. See *Mason* v. *Sams,* 5 F. 2d 255 (W.D. Wash.).

The matter is governed, we suggest, by two complementary principles, derived from the role which the United States assumed as guardian of the Indians. That responsibility carried with it, first, plenary power to take appropriate measures to protect the interests of the tribe as a whole. *United States* v. *Kagama,* 118 U.S. 375, 383–384. Most relevantly, the government could manage tribal property for the common benefit of all the members. See, *e.g., Morrison* v. *Work,* 266 U.S. 481, 485. An aspect of that management, it would seem clear, was regulation of the wild-

life resource of the reservation with a view to its preservation and its equitable distribution among the tribal members. See *In re Blackbird*, 109 Fed. 139, 144 (W.D. Wis.); Department of the Interior, *Federal Indian Law* (1958), p. 498. That is not to say that the United States could properly require the tribe to share its resource with others. But, acting solely in the interest of the tribe, the government could, we believe, impose restrictions on times, places and manner of hunting or fishing which were reasonably calculated to conserve the asset for the members, present and future, and to assure all of them an equal opportunity to enjoy it.

So, also, we submit, the United States was fully empowered—with respect to any tribe under its tutelage—to adopt measures to safeguard the health, morals, or general welfare of the members. See, *e.g.*, *United States* v. *Sandoval*, 231 U.S. 28. And, toward that end, it seems wholly proper to outlaw or control the use of certain weapons—as dangerous or inhumane—and otherwise to regulate hunting in the interest of safety.

The other principle potentially involved is the duty of the United States, as guardian, to insure that its wards do not injure their neighbors, whether their persons or their property. See, *e.g.*, *United States* v. *Forty-three Gallons of Whiskey, etc.*, 93 U.S. 188. Of course, the day when "Indian depredations" were feared is long since past. But we suggest that the government still has an obligation, and a corresponding authority—with respect to tribes remaining under

federal supervision—to prohibit or restrict activities on Indian reservations that might impair the rights of others. As applied to hunting and fishing, this may include not only safety regulations, but, more importantly, restrictions designed to protect migratory wildlife which is not confined to the reservation lands. Cf. *Makah Indian Tribe* v. *United States*, 151 Ct. Cl. 701, certiorari denied, 365 U.S. 879. In such cases, although the Indians could not be required to admit strangers onto their lands to hunt or fish, they might properly be prevented from wholly appropriating or destroying a resource which is only partly theirs.

What we have said of the federal power to regulate the hunting and fishing of the Menominees may be thought to leave little scope to the "rights" guaranteed by the Treaty of 1854, on our assumption that the State is now free to regulate the taking of wildlife on the former reservation lands to the same extent that the United States might have. But there are, we suggest, very significant differences between the hunting and fishing privileges of the Indians in Menominee County and those of other citizens of the State elsewhere.

First, however subject it may be to regulation, the Menominees enjoy a *right* to hunt and fish on their lands, unlike all other citizens who enjoy such a privilege, if at all, only as the State chooses to permit it. Under no circumstances can the State absolutely deprive the Indians of their federal right to take the wildlife of their lands. In this respect, the Menominees enjoy a special status comparable to

those tribes to which federal treaties have guaranteed off-reservation fishing or hunting rights. See Memorandum for the United States as Amicus Curiae in *Puyallup Tribe* v. *Department of Game,* No. 247, and *Kautz* v. *Department of Game,* No. 319. One immediate consequence is that they cannot be taxed in their exercise of their rights. *Tulee* v. *Washington,* 315 U.S. 681.

Moreover,—and in this unlike Indians in whom a federal treaty recognizes only a right to fish or hunt at specified locations "in common with the other citizens of the Territory"—the Menominees cannot be made to share with others the wildlife of their reservation. The tribe cannot be required to admit outsiders to hunt on its lands, nor even to fish in the navigable waters within the former reservation boundaries. See *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Metlakatla Indians* v. *Egan,* 369 U.S. 45, 55–56. Nor can the Menominees be compelled to share their wildlife resource with strangers for the sake of "conservation." While this does not preclude regulation to assure preservation of the asset for the tribe or fair distribution of the resource among its members, conservation measures with a broader goal cannot properly be made applicable to the Menominee lands—subject only to the caveat previously stated for migratory fowl or fish which are not exclusive resources of the Indian lands. In short, the wildlife native to Menominee County belongs to the tribe; it is not an asset of the State. Thus, to suppose an extreme example, it would clearly be impermissible

for the State to set aside a portion of the Menominee lands as a wildlife refuge.

We recognize that the line we have attempted to draw between the core of the treaty right and the area of permissible regulation is not self-executing. But we think it inappropriate to press the matter further—especially in this litigation which involves no challenge to any particular restriction. Moreover, it may well be that an authoritative declaration of the guiding principles will suffice. The State may determine to leave the tribe free to adopt and police itself the measures necessary to conserve and fairly apportion the native wildlife. And if there are problems with respect to migratory birds and fish, it is not unlikely that the State and the tribe can reach agreement on appropriate restrictions once the basic obligation is established.

B. THE PRESENT AND FUTURE BENEFICIARIES OF THE TREATY HUNTING AND FISHING RIGHTS

In our view, petitioner has made a persuasive showing that the Termination Act of 1954 was intended to leave the hunting and fishing rights conferred by the Treaty of Wolf River where they were, in the Menominee Tribe.

Certainly, the termination of federal supervision did not necessarily dissolve the tribe. See *Federal Indian Law, op. cit. supra,* p. 464. And, absent express congressional action, the Indians are free to continue their tribal organization, as they have apparently elected to do. Accordingly, there appears to be no bar

to the conclusion of the Court of Claims below that the presently enrolled members of the Menominee Tribe continue to share among themselves whatever hunting and fishing rights were conferred by treaty.

There remains a question as to the future of these rights, assuming the Court deems it appropriate to reach this issue. Because the rights are tribal in nature, it would seem improper to permit their allotment to individuals as property, heritable or assignable. But it does not necessarily follow that the rights terminate upon the death of the presently enrolled members. The closure of the tribal roll for the purpose of distributing trust property need not be viewed as barring the tribe from itself continuing an active membership roll, so long as the tribal organization subsists. See *Federal Indian Law, op. cit. supra,* pp. 414–415. The recent action of the Menominee Tribe suggests, we believe, a permissible solution. The conditions for future membership established by the tribe seem reasonable, although one might question the propriety of viewing as a member for the purpose of exercising tribal hunting and fishing rights an Indian who himself never resided on the tribal lands and has become wholly assimilated in white society.

At all events, we assume the treaty rights to hunt and fish will appertain only to those lands which are held communally and that they will subsist only so long as there remains an identifiable tribal organization with a known membership. Doubtless, in time, those conditions will cease to exist. In the meanwhile, we think it not improper to recognize the continuing force of ancient treaty rights.

For the reasons stated here and in our original brief, we believe the judgment below should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

CLYDE O. MARTZ,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

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